In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-652

JOHN HAGAMAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of having possessed goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. 659. He was sentenced to five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

The government's evidence showed that on the night of December 9, 1969, a truckload of furniture moving in interstate commerce was stolen from Houston Mo-

tor Lines of Conover, North Carolina (Tr. II 10-12).[1] On December 11, 1969, local police and F.B.I. agents searched petitioner's home pursuant to a search warrant and found all of the stolen furniture in a storage room attached to petitioner's home (Tr. II 10, 19). One piece of furniture had been unwrapped (Tr. II 17). The furniture had been brought to petitioner's home in the early morning hours of December 10, 1969, by one Kenneth Dula, who pleaded guilty to stealing it prior to petitioner's first trial (Tr. II 55, 62-63).

Petitioner (and other witnesses) testified that he was not at home at that time but was at a gambling club which he managed (*e.g.*, Tr. II 46, 61, 93), and that he knew nothing about the furniture (Tr. II 64, 97). Petitioner further stated that after Dula had telephoned the club to advise him that he had "unloaded some stuff" at his house, petitioner told others to tell Dula to "get his stuff out of my house" (Tr. II 93).

After this testimony, the government called Dula in rebuttal. At the first trial, which ended in a mistrial, Dula had testified that prior to the robbery he had arranged with petitioner to deliver stolen furniture to him (Tr. I 23-26) and that after delivery he had told petitioner in person that he had "left the stuff" (Tr. I 30).[2] However, when Dula was called

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[1] "Tr. II refers to the transcript of petitioner's second trial (March 18, 1971). "Tr. I" refers to the transcript of his first trial which ended in a mistrial on March 18, 1970.

[2] The reasons for the mistrial in the first case, granted at petitioner's request (Tr. I 80, 84), are not clear.

at the second trial, he claimed that he remembered nothing (Tr. II 147 *et seq.*). The prosecutor then moved to examine him as a hostile witness (Tr. II 149) and was permitted to elicit his testimony at the first trial by reading various questions and answers to him and asking whether he remembered the questions and answers (Tr. II 149-166, 170-181).

Petitioner contends that examination of Dula as a hostile witness and use of his prior testimony was error, since the prosecution was not surprised by Dula's hostility. However, unlike the cases cited by petitioner (Pet. 7), the record here indicates no prior awareness by the prosecutor that the witness would refuse to testify as he had previously (Tr. II 145-182). It is well settled that prior testimony is admissible for purposes either of impeachment or refreshment of recollection. *E.g.*, *United States* v. *Guglielmini*, 425 F. 2d 439 (C.A. 2); *Collins* v. *United States*, 383 F. 2d 296 (C.A. 10); *United States* v. *Barrow*, 363 F. 2d 62 (C.A. 3), certiorari denied, 385 U.S. 1001; *Woody* v. *United States*, 379 F. 2d 130 (C.A. D.C.), certiorari denied, 389 U.S. 961. The purported failure to remember here certainly provided an occasion for refreshment of recollection and should also be considered inconsistent testimony giving rise to impreachment.[3]

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[3] Moreover we note that, because of Dula's claimed inability to remember (whether actual or feigned), he was in legal effect "unavailable" as a witness and his prior sworn testimony could constitutionally have been introduced as substantive evidence. See *California* v. *Green*, 399 U.S. 149, 165-170. Although the majority of federal courts still follow the

Petitioner also contends (Pet. 8) that the trial judge erred in refusing to instruct that Dula's prior testimony could be considered only as bearing on his credibility. Petitioner, however, did not seek additional instructions and expressed satisfaction with the charge as given (Tr. II 214-215). Even assuming that petitioner would have been entitled to a limiting instruction as to Dula's prior testimony, the failure of the trial judge *sua sponte* to give such an instruction was not plain error under Rule 52(b), Fed. R. Crim. P. *Benson* v. *United States*, 402 F. 2d 576, 581 (C.A. 9).

"orthodox" rule that prior inconsistent statements are not admissible for the truth of their content, see *United States* v. *Small*, 443 F.2d 497, 498-500 (C.A. 3), few if any of the cases so holding dealt with the situation here, where the prior statement consisted of sworn testimony as to which the defendant had a full opportunity for cross-examination at the time the statement was made. The Second Circuit has long held that, where the prior statement was made under oath, it has a sufficient likelihood of trustworthiness to be admissible as substantive evidence. *E.g.*, *United States* v. *DeSisto*, 329 F.2d 929, 932-934 (C.A. 2), certiorari denied, 377 U.S. 979; *United States* v. *Mingoia*, 424 F.2d 710, 712 (C.A. 2). The view that all prior inconsistent statements should be admissible for the truth of their content has been advanced by most commentators and has been adopted in the Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 801(d). See *United States* v. *Small*, *supra*, 443 F.2d at 498-499.

Therefore it is respectfully submitted that the petition for a writ of certiorari should be denied.

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